

TALBOT COUNTY BOARD OF APPEALS
Appeal No. 18-1680

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 6:30 p.m. on August 6, 2018, on the application of **Bald Eagle's Nest, LLC** ("Applicant"). Applicant requests a variance of the 150 foot state highway setback from all arterial highways on properties located in the Western Rural Conservation ("WRC") Zoning District, for the purpose of replacing an existing "Gate House" with a larger, 1,000 square foot residential dwelling (the "New Structure") situated on a different footprint from the Gate House approximately 86 feet from the State Highway right-of-way. The subject property (the "Property") is 9.446-acre parcel of land located at 5028 Wintersell Road, Oxford, Maryland, and shown on tax map 54 grid 1 as deed tract 4 of parcel 33. The Property is bounded to the north by MD Route 333 ("Oxford Road"), to the east by a 5.66 acre parcel zoned RC and WRC, to the west by tax deed tract 3 of parcel 33, and to the south by deed tract 5 of parcel 33. Applicant is the owner of the Property, along with all other adjacent deed tracts of parcel 33, for a total of 107.46 acres. The existing land use of the Property is agricultural.

The request is made in accordance with Chapter 190 Zoning, Article V, §190-114 and Chapter 190 Zoning, Article IX, §190-182 of the *Talbot County Code* (the "Code").

Present at the hearing were Board of Appeals members Paul Shortall, Jr., Chairman, Phillip Jones, Vice Chairman, John Sewell, Frank Cavanaugh and alternate member Jeffrey Adelman. Ryan D. Showalter, Esquire and Brendan S. Mullaney, Esquire of McAllister, Detar, Showalter & Walker LLC presented the variance request on behalf of Applicant. No members of the public were present. Brennan Tarleton, Planner I, attended the hearing on behalf of Talbot County. William C. Chapman was the attorney for the Board of Appeals (the "Board"). It was noted for the record that each member of the Board had individually visited the Property.

The following exhibits were offered and admitted into evidence as Board's Exhibits as indicated:

1. Application for Non-Critical Area variance.
2. Copy of a portion of the Talbot County tax map with the property highlighted.
3. Appeals Notice of Public Hearing.
4. Certificate of publication of the Notice of Public Hearing from The Star Democrat.

5. Notice of hearing with a list of nearby property owners attached.
6. Copy of Non-Critical Area variance requirements from the *Code* with the written responses of the Applicants to each applicable warrant.
7. Staff Report dated August 6, 2018.
8. Sign maintenance agreement.
9. Comments from the State Highway Administration dated July 5, 2018.
10. Independent Procedures Disclosure and Acknowledgment Form.
11. Aerial photographs.
12. Photograph from site visit taken on June 29, 2018.
13. Site plan of the property prepared by Lane Engineering, LLC.
14. Construction and floor plans prepared by Plan Ahead Drafting & Design LLC.

The following exhibits were offered and admitted into evidence as Applicant's Exhibits as indicated:

1. A series of seven photographs depicting likely tree disturbance should the New Structure be located within the existing setbacks.
2. Photographs, illustrations and summaries of Applicant's stated goals in removing the Gate House and building the New Structure in its proposed location.
3. Photographs of other dwellings in the nearby Oxford Road corridor situated closer to Oxford Road than the proposed New Structure.

Mr. Showalter testified on behalf of Applicant. He described the existing structure (the "Gate House" as a small, white guest house dating back to the late 19th century, uninhabitable by contemporary standards. The Gate House is a legal, nonconforming structure; although its date of construction is unknown, Mr. Showalter said it was constructed prior to the establishment of setback requirements in Talbot County. It is currently within both the 150 foot state highway setback to Oxford Road (at 64 feet) and the 50 foot side-yard setback to Wintersell Road (at 16 feet). Because Applicant owns the adjacent parcels accessible by Wintersell Road, Mr. Showalter described said road as "essentially a private driveway." Mr. Showalter testified that, were the existing Gate House to be demolished and replaced in its existing location, the New Structure would still be within both the 150 foot and 50 foot setbacks, but if the variance were granted and

a new structure built in a location slightly to the southwest of the Gate House (the “Proposed Site”), the New Structure would comply with the 50 foot setback (at 50 feet) while become more conforming with the 150 foot setback than the current Gate House (at 86 feet).

The Proposed Site is situated in an opening in a growth of mature hardwood trees. Mr. Showalter said building in the Proposed Site would disturb, at most, two trees; building to the south, further away from Oxford Road, he said, would disturb seven to nine trees. Mr. Showalter said the New Structure will maintain the general appearance of the Gate House and remain close to Oxford Road.

Mr. Showalter and Mr. Mullaney entered three exhibits into evidence. Applicant’s Exhibit 1 is a series of seven photographs, depicting the existing Gate House; an aerial image serving as a key to the location of the remaining five photos; and five photographs showing trees overlaid with star icons indicating they would require removal or die if the New Structure was built outside the setback area. Mr. Showalter testified that the relocation of the New Structure satisfies minimum adjustment requirements because it would place the New Structure in a relative gap within the stand of mature trees. Applicant’s Exhibit 2 is a seven-page exhibit, including photographs and illustrations, summarizing Applicant’s stated goals to retain the rural character of the New Structure, building and minimum livability code impacts, floor plans and Applicant’s desire to maintain a building footprint near Oxford Road. Applicant’s Exhibit 3 contains photographs of other dwellings in the nearby Oxford Road corridor situated closer to Oxford Road than the proposed New Structure. Mr. Showalter said Applicant’s proposal is consistent with the built environment present along Oxford Road, and that no adjacent residences would be impacted by granting the variance request.

In response to a question from Vice-Chairman Jones, Mr. Showalter clarified that, although all four deed tracts are contained within the same parcel 33, no subdivision would be required to convey individual deed tracts. Mr. Jones asked if any legal restrictions existed preventing construction in a large area opposite Wintersell Road from the Guest House; Mr. Showalter said no such restrictions existed. Mr. Jones asked if any historical evidence existed as to the date of the Gate House’s construction. Mr. Showalter said the evidence is primarily anecdotal, that aerial photographs exist as far back as 1937 (prior to the establishment of setback requirements), and that the Gate House is of post-and-beam construction with no foundation, typical of structures from the later 19th century.

Mr. Adelman noted that the required septic field is currently under agricultural use and asked about plans for a septic system if and when the New Structure is built. Mr. Showalter said a traditional septic system would be utilized, with two alternative proposals prepared, and that the rest of the surrounding land would remain in agricultural use. Mr. Adelman asked if Applicant considered orienting the New Structure to maintain the same orientation of the Gate House. Mr. Showalter said the proposed plans for the New Structure fit better into the opening in the trees, and that the proposed side façade of the New Structure was similar to the front of the existing Gate House.

Mr. Shortall said the New Structure is a “totally different structure” than the existing Gate House, and referenced similar gate houses within the county located on Miles River Neck. The New Structure, Mr. Shortall said, is “just a guest house.” Mr. Jones said nothing would prevent a future owner from building in the permitted buildable area and using the proposed New Structure as a guest house; Mr. Showalter responded that only accessory structures are permitted in the WRC.

Mr. Jones said the existing Gate House is not likely a livable structure in its current form, nor in the constraints that would exist with a replacement in kind. Mr. Showalter said that if Applicant were replacing the Gate House in kind, or even with a maximum 20 percent increase for an administrative variance, the application would not require Board approval, but that a modified replacement of the Gate House would still be unlivable. Regardless of precisely when the Gate House was built, he said, it was built prior to the establishment of setback requirements in Talbot County, that the Applicant sought to minimize its variance request in spirit with compliance while maintaining the character of the Guest House instead of simply building a “house in the woods”, and asked that the Board find unreasonable hardship. Mr. Showalter said that Applicant does not intend to proceed with a replacement in kind.

Mr. Shortall referred to Applicant’s Exhibit 1, said that he had returned to the Property and walked the wooded area and questioned the need to remove the number of trees alleged by Applicant should Applicant comply with the setback requirements. Mr. Showalter said Exhibit 1 takes into account construction equipment that would be needed to move locations and therefore displace existing trees.

Mr. Shortall said that, were the Property a small parcel, using a half acre as an example, the Board’s position might be different, but that the Property itself, and its adjacent deed tracts,

comprise a large parcel with many available building sites. Mr. Adelman said the Applicant was trying to create an impression of maintaining the character of an existing structure in proposing the New Structure, a criteria for which the Board does not have the ability to consider pursuant to the Code, and, in a question to Mr. Showalter, clarified that no new structures have been built within the 150-foot setback within the past 10 years. Mr. Cavanaugh said that, should the Board grant the requested variance, it would be setting precedent without justification.

In response to Applicant's argument that the variance request furthers public policy of not disrupting forested areas, Mr. Jones said there exists an overriding public policy of consistently adhering to variance standards provided by the Code. He said the property characteristics of a parcel have to create the hardship, and that no hardship exists on the Property where other available building sites that would comply with setback requirements exist. Mr. Jones added that, under Maryland law, the Board must consider the Comprehensive Plan, and that while he personally understood the logic of Applicant's request, variances are not a vehicle of convenience and that he did not see latitude under existing law to grant Applicant's request when similar requests have been denied.

The Board then considered the application. Based on the testimony, application and exhibits, upon motion and seconded, the Board denied the requested variance, by a vote of five to zero.

The Board made the following findings of fact and law:

1. All legal requirements pertaining to a public meeting were met.
2. No unique physical characteristics exist, such as unusual size or shape of the property or extraordinary topographical conditions, such that the literal enforcement of the provisions of this chapter would result in a practical difficulty or unreasonable hardship in enabling the applicant to develop or use this property. The size, shape or physical characteristics of the Property is not unique or unusual, and provides for ample alternative building sites for a new structure. The need sufficient to justify a variance must be substantial and urgent and not merely for the convenience of the applicant. *Montgomery County v. Rotwein*, 169

Md. App. 716, 732 (2006) (internal citation omitted). The expression “practical difficulties or unnecessary hardships” means difficulties or hardships peculiar to the situation of the applicant and “are of such a degree of severity that their existence is not necessary to carry out the spirit of the ordinance, and amounts to a substantial and unnecessary injustice to the applicant.” *Id.* Variances granted on the basis of practical difficulties or unnecessary hardships “should not be made except where the burden of the general rule upon the individual property would not, because of its unique situation and the singular circumstances, serve the essential legislative policy, and so would constitute an entirely unnecessary and unwarranted invasion of the basic right of private property.” *Id.*

3. The granting of the variance would be based upon circumstances which are self-created or self-imposed. The circumstances are created by the Applicant’s desire to build a new structure similar in character, but not use, to the existing Gate House.
4. Greater profitability or lack of knowledge of the restrictions was not considered as sufficient cause for the granting of the variance request.
5. The granting of the variance request would be contrary to the public interest. Although the Board did not find specifically that the granting of the variance request would be a detriment to adjacent or neighboring properties, the uniform enforcement of the setback requirements of the Code, absent unique circumstances or extraordinary topographical features, is in the public interest, and the variance of those standards in this case would be a detriment to the public interest and contrary to the Board’s denial of similar requests.

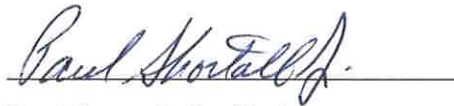
6. The variance request exceeds the minimum adjustment necessary to relieve the practical difficulty or hardship, if any. It does not appear that an adjustment of the setback requirements is necessary under the circumstances. The Property is a nearly 10-acre parcel, on which Applicant has alternatives for the construction of a New Structure outside the setbacks.

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Applicant, **BALD EAGLE'S NEST, LLC** (Appeal No. 18-1680) is **DENIED** the requested Non-Critical Area variance.

GIVEN OVER OUR HANDS, this 24th day of October, 2018.

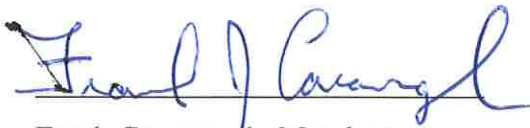
TALBOT COUNTY BOARD OF APPEALS



Paul Shortall, Jr. Chairman



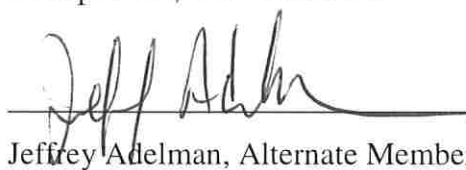
John Sewell, Member



Frank Cavanaugh, Member



Phillip Jones, Vice Chairman



Jeffrey Adelman, Alternate Member